SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

Nos. 36 and 37

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,
Appellants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,
Intervenor-Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,
Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

APPELLEES' BRIEF ON THE MERITS.

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INDEX.

	Page
Preliminary Statement	1
General Statement	2
Argument	5
1. The trial court did NOT adopt a rule holding that "districts are not as equal as practicable if any plan proposed can result in districts with smaller population variances"	5
2. A. The burden of proof is on those supporting an apportionment to justify it on rational grounds	7
B. The burden of proof is on appellants	9
3. The "de minimis" doctrine has no relevance to redistricting matters	11
4. The districts of the Act are NOT as "nearly equal as is practicable", because transfer of whole counties between adjacent districts would create districts more nearly equal	13
5. "Legislative interplay" is NOT a constitutionally acceptable basis for variances from equal population districts	16
6. Compactness is NOT a defense for unbalanced districts	24
7. Percentage or numeric comparisons with other decisions are of no significance in testing good faith efforts or compliance with acceptable standards	24
Conclusion	29

Cases Cited.

Baker v. Carr, 369 U. S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962) 12, 18
Black's Legal Dictionary, 4th Edition 11, 18

Cedillo v. Standard Oil Co. of Texas, 291 F. 2d 246 (C. A. Tex. 1961), certiorari denied 368 U. S. 955, 82 S. Ct. 397, 7 L. Ed. 387 (1962) 11
Commissioner v. Duberstein, 363 U. S. 278, 4 L. Ed. 2d 1218, 80 S. Ct. 1190 (1960) 10
Connor v. Johnson, 279 F. Supp. 619 (1966), aff'd. per curiam, 386 U. S. 483 (1967) 25

Exon v. Tiemann, 279 F. Supp. 609, 612 (D. C. Nebr. 1968) 6

Gong v. Kirk, 278 F. Supp. 133 (1967), aff'd. sub nom. Kirk v. Gong, 389 U. S. 574, 88 S. Ct. 695, 19 L. Ed. 2d 784 (1968) 24, 25

Kilgarlin v. Hill, Secy. of State of Texas, 386 U. S. 120, 87 S. Ct. 820, 17 L. Ed. 2d 771 (1967) 7
Kilgarlin v. Martin, Secy. of State of Texas, 252 F. Supp. 404 (S. D. Tex. 1966), aff'd. sub nom. Kilgarlin v. Hill, Secy. of State of Texas, 386 U. S. 120 (1967) 8
Kirk v. Gong, 389 U. S. 574, 88 S. Ct. 695, 19 L. Ed. 2d 784 (1968), affirming Gong v. Kirk 24, 26

Lucas v. Colorado General Assembly, 377 U. S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964) 13

Manning v. Jones, 349 F. Supp. 992 (C. A. Mo. 1965) 11
Maryland Citizens Comm. for Fair Cong. Redistr. v. Tawes, 253 F. Supp. 731 (D. Md. 1966), aff'd. sub nom. Alton v. Tawes, 384 U. S. 315 (1966) 8
Montgomery Ward and Co. v. Steele, 352 F. 2d 822 (C. A. Mo. 1965) 11
Murphy v. Shelby, 253 F. 2d 418 (C. A. Mo. 1965) .. 11

Preisler, III v. Secy. of State of Mo., 279 F. Supp. 952 to 1012 (W. D. Mo. 1968). This is the instant case 2

Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) 8, 25, 27

Schwartz v. Essex County Board of Taxation, 129 N. J. L. 129, 28 A. 2d 482 (1942) 12

Swann v. Adams, III, 385 U. S. 440, 87 S. Ct. 569, 17 L. Ed. 501 (1967) 7, 8, 25, 27

United States v. United States Gypsum Co., 333 U. S. 364, 92 L. Ed. 2d 746, 68 S. Ct. 525 (1948) 10

Wesberry v. Sanders, 376 U. S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) 17

Related Cases Not Cited.

Kirkpatrick v. Preisler, 385 U. S. 450, 87 S. Ct. 613, 17 L. Ed. 2d 511 (1967), affirming Preisler, II.

Preisler, I, v. Secy. of State of Mo., 238 F. Supp. 952 (W. D. Mo. 1965).

Preisler, II, v. Secy. of State of Mo., 257 F. Supp. 952 (W. D. Mo. 1966), aff'd. sub nom. Kirkpatrick v. Preisler, 385 U. S. 450, 87 S. Ct. 613, 17 L. Ed. 2d 511 (1967).

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

Nos. 1116 and 1117.

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,
Appellants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,
Intervenor-Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,
Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

APPELLEES' BRIEF ON THE MERITS.

Preliminary Statement.

In view of the extensive discussion, explanation, and documentation contained in the majority opinion of the court below, Appellees will seek not to burden this Court with repetition thereof but will refer to appropriate por-

tions of the lower court's opinion in answer to much of what is presented in the points raised in Appellants' argument.

The attention of this Court is directed to the separate document containing the opinion, decision, and judgment of the court below, filed as a separate document by Appellants with their "JURISDICTIONAL STATEMENT," and entitled "APPENDICES TO JURISDICTIONAL STATEMENT" along with another separate document entitled "FOOTNOTES TO APPENDICES A AND B OF JURISDICTIONAL STATEMENT." Because of the dependence of these two documents on each other, they need be read together. This case is now reported in full in 279 F. Supp. 952 to 1012 (1968).

References to the opinion, decision, and judgment will be by citation to the "APPENDICES TO JURISDICTIONAL STATEMENT" and designated (A. J. S. ...), references to footnotes to the majority opinion by citation to "FOOTNOTES TO APPENDICES A AND B OF JURISDICTIONAL STATEMENT" and designated (F., A. J. S. ...).

References to the "APPENDIX (Rules 17 and 36)" are designated by (A. ...) and by (A. R. ...) when referring to the trial record portion of this Appendix. References to the respective "APPELLANTS' BRIEF ON THE MERITS" of Kirkpatrick and Anderson are designated (App. Br. ...) and "BRIEF OF APPELLANTS F. V. HEINKEL, ET AL." (App. H's. Br. ...).

General Statement.

The court below in its opinion, decision, and judgment, properly found that the 1967 Missouri Congressional Redistricting Act does not comply with Article I, Section 2 of the Constitution of the United States and is unconstitutional and void.

The majority opinion (A. J. S. 1-22) and findings of fact and discussion thereof (A. J. S. 23-82) and the comments of concurring Judge Collinson (A. J. S. 97-98) and footnotes thereto (F. A. J. S. 1-12) extensively and adequately present the law as applied to the facts of the instant case and the court reaches the appropriate determination and disposition of the issues in deciding that the Act is unconstitutional and void for violation of the aforesaid Article I, Section 2.

Appellees contend that the differences between several adjacent districts, such as 25,802 and 21,655 inhabitants, are gross and excessive and NOT "minor" or "de minimis" as Appellants claim. When many whole counties of from 4,516 to 10,850 inhabitants are situated on the boundary lines of adjacent districts and are thereby available for transfers between districts, which transfers would significantly diminish the differences between districts, the aforesaid differences of the Act cannot be legally justified under the constitutional requirements aforesaid. The population of a whole county cannot be considered trivial, "minor", or "de minimis."

Official United States Census Bureau population data for Missouri are and have been available for counties and townships of counties, and for wards, precincts, and blocks in the more densely populated areas, which data could have and should have been utilized for the construction of districts of lower population differences than those of the Act.

The majority opinion in its findings of fact (idem, pages 23 to 41) shows that the General Assembly had before it bills whose maximum district population differences were significantly smaller than the differences of the Act. Such bills served to bring to the attention of the legislators that districts of smaller differences could be easily made and that the districts of the Act were not as nearly equal as is practicable.

The constitutionality of the Act must be determined upon the population of the districts created by the Act. Difficulties inherent in the legislative process of the enactment of legislation do not excuse the failure to produce a constitutionally valid act. A citizen's constitutional rights cannot be abrogated nor violated for political expediency in the enacting process.

Unwarranted and unjustified population differences between adjacent districts, which differences can readily and easily be significantly diminished by the transfer of whole counties or other political subdivisions from one district to an adjacent district, conclusively prove that the districts have not been created as required by the aforesaid Article I, Section 2.

Appellees contend that the table of district populations and the map of the districts clearly demonstrate that the districts created by the Act are not as nearly equal as is practicable, because simple transfer of counties between adjacent districts would have created districts of significantly smaller population differences. (See table and map, pages 14 and 15, this Brief, for examples of such transfers.)

The position of Appellees is supported by the comments of Judge Collinson in his clarification of his concurrence in the opinion, decision, and judgment of the court below (A. J. S. 97). (Judge Collinson's comment also quoted on page 5, next page following, this Brief.)

ARGUMENT.

1.

The Trial Court Did NOT Adopt a Rule Holding That "Congressional Districts Are Not as Equal as Practicable if Any Other Plan Proposed Can Result in Districts With Smaller Population Variances."

Appellants argue (App. Br. 44-49) that the lower court's ruling is based on a holding that congressional districts are not as equal as practicable if any other plans proposed to the legislature or to the court can result in districts with smaller population variations. The court did NOT so hold.

Appellants misread the rules applicable to congressional redistricting applied by the lower court.

Appellants misconstrued evidentiary matters with rules of law. The trial court here considered the facts of other proposed plans along with all other evidence before it.

Judge Collinson's comment in concurring with the majority opinion (A. J. S. 97-98) makes this point clear when he says:

> "No one can believe or contend that the Supreme Court has said that the 'one-man one-vote' doctrine requires that Congressional districts be exactly equal in population; certainly the majority opinion does not so state. But neither has the Supreme Court said that there is a mathematical formula for inequality (within a certain percentage) which will satisfy the 'nearly equal as practicable' rule."

and on page 98,

> "I do not condemn the 1967 Act because there were more equal plans defeated in the Legislature; nor do I condemn it because it divides St. Louis County between a number of districts. I believe the plan is

> **unconstitutional because on its face and under the undisputed evidence it is not an attempt to divide the State of Missouri in Congressional districts that are as nearly equal in population as is practicable.** And this **for the reason that it is obvious that entire counties can be moved to adjoining districts with a resulting substantial decrease in the variances of population in the present Act** and because **there is no evidence in this record that can be said to explain or justify why this was not done.**" (Emphasis supplied.)
>
> "In short, the proponents of the 1967 act have failed to carry the burden of proof imposed on them by law."

The Appellants' argument takes out of context the statement of the majority opinion (A. J. S. 10-12) which rejects the overly broad concept of "de minimis" and completely ignores the full discussion of the burden of proof (A. J. S. 7-9) and the court's rejection of the political expediency argument (A. J. S. 6-7).

In citing language from **Exon v. Tiemann**, 279 F. Supp. 609, 612 (D. C. Nebr. 1968), appellants neglect to point out that in **Exon** no issue was presented and no evidence heard on the point of non-rational grounds or improper motives. The same situation pertains in each of the cited cases (App. Br. 47-48). Either no evidence of non-rational grounds was presented, or if presented, was rejected by the lower court.

Appellees do not argue that the legislature must adopt the most precise plan mathematically possible, but that a plan which deviates from attainable precision cannot be justified upon grounds or upon motives which are not constitutionally acceptable for variance.

Appellees further point out, as did the trial court at the hearing of the case (A. 70), that the Missouri legislature kept no report of its debates and proceedings and no formal committee reports other than mere recommenda-

tions as to passage. Consequently, neither the trial court nor this Court has any basis for justification, on rational grounds, of the variances between district populations found in the 1967 Act.

Contrary to the Appellants' inaccurate simplification of the trial court's ruling, it is clearly stated in its opinion (A. J. S. 17) as follows:

> "This Court obviously has no alternative other than to deny defendants' pending motion for the reasons that (1) we must find that **the 1967 Act does not in fact divide the population of Missouri into districts as nearly equal as is practicable**; and (2) because **the obviously avoidable population variances in the 1967 Act cannot be satisfactorily justified on any legally acceptable ground supported by any evidence in this record.** It is therefore totally impossible for this Court, on the basis of any substantial evidence, to relate any 'declared justification to any specific inequalities among the districts' or to 'articulate any satisfactory grounds for rejecting . . . other plans presented (both) to the court (and to the 74th General Assembly of Missouri) which would have produced substantially smaller deviations than those created by the 1967 Act. **Kilgarlin v. Hill**, supra, at page 124. Defendants have simply failed to carry the burden of proof imposed on them by **Swann v. Adams, III**, a case decided before Senate Bill No. 182 was introduced in the 1967 Missouri Legislature. We so find and determine." (Emphasis supplied.)

2.

A.

The Burden of Proof Is on Those Supporting An Apportionment Plan to Justify It on Rational Grounds.

The rule and authorities are concisely stated by the trial court's opinion (A. J. S. 9):

> "The principle is firmly settled that the proponents of a redistricting plan must sustain the burden of justifying **any** deviation from practicable equality of population. **Swann v. Adams**, supra, at 445; **Reynolds v. Sims**, supra, at 577-80; **Maryland Citizens Committee for Fair Cong. Redistr. v. Tawes**, 253 F. Supp. 731, 733 (D. Md. 1966), aff'd sub nom. **Alton v. Tawes**, 384 U. S. 315 (1966). This Court must also follow and apply **Kilgarlin v. Hill's** express requirement that before a particular plan may be approved as constitutional the District Court must be able, from the evidence adduced by the defendant, to articulate legally acceptable reasons for the specific variations in population between districts that have been shown to exceed the 'as nearly as is practicable' standard of Art. I., § 2."

Appellants argue (App. Br. 49-50) that "minor" variations in population are permissible without substantial evidence justifying the variances. Appellants thus seek a variation of the burden of proof formula proposed in **Kilgarlin v. Martin, Secy. of State of Texas** (S. D. Tex.), 252 F. Supp. 404, which was reversed (sub nom. **Kilgarlin v. Hill, Secy. of State of Texas**, 386 U. S. 120) by this Court which retained its basic standard enunciated in **Swann v. Adams, III**, 385 U. S. 440 (1967). To lay down so fixed a formula as proposed in **Kilgarlin v. Martin** would be to produce the disorder which inevitably results from an attempt to lock legal concepts into mathematical formulae. **Kilgarlin** (which was reversed) sought to establish three zones of consideration:

> (1) "De minimis" variations which are per se constitutionally permissible,
>
> (2) "Per se" variations at the other extreme which are not constitutionally permissible, and

(3) All situations in between, in which the burden is on the proponent to justify variations on constitutional grounds.

The obvious weakness in such a formula is that it must be applied to situations totally dissimilar to each other. What might be a minor variation under the circumstances of one state might well be a gross deviation in another. While "mathematical exactitude" may be unattainable, it certainly is capable of clear definition and, as a goal, it establishes a clear target at which to shoot. But the same cannot be said of "minor" or "de minimis" as standards of clarification. Each court must still decide on the basis of the particular facts and figures.

The formula fails for another reason. This Court has made it clear that state legislatures may not toy with the right of the voter to an equal vote. Good faith efforts are required. The concept of "one man—one vote" leaves no room for bad faith within a limited range. There must not be established any safety zone in which constitutionally unacceptable grounds may operate. To do so would be to take us back to the **pre-Baker** morass in which the deviations became progressively worse from year to year to the point where the responsiveness of state government to the will of the majority was not only threatened but frequently subverted. The court must not create any haven of refuge for those who resist the concept of voter equality.

B.

The Burden of Proof Is on Appellants.

The trial court, upon the testimony and the evidence before it, found that the legislature employed standards in redistricting which are not justifiable as constitutionally

acceptable grounds for variance from a population basis. The court said (A. J. S. 7):

> "We find that the defendants' evidence leads to the inevitable conclusion that a majority of the members of the legislature were motivated by considerations other than the constitutional objective of 'practicable equality' ".

Under time honored rules of appellate review, where a trial has been by a court without a jury, the court findings must stand unless "clearly erroneous". Fed. Rules Civ. Prac. 52 (a). Findings of fact in actions tried without a jury shall not be set aside unless clearly erroneous. A finding is only clearly erroneous, when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. **United States v. United States Gypsum Co.**, 333 U. S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525. This rule also applies to factual references from undisputed facts. Idem. 333 U. S. at 394.

The rule is particularly applicable in situations which are matters basically of fact, for determination on a case-by-case basis. In **Commissioner v. Duberstein**, 363 U. S. 278, 289, 4 L. Ed. 2d 1218, 1227, 80 S. Ct. 1190 this Court said:

> "Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact. Baker v. Texas & P. R. Co.,

359 U. S. 227, 3 L. Ed. 2d 756, 79 S. Ct. 664; Commissioner v. Heininger, 320 U. S. 467, 475, 88 L. Ed. 171, 177, 64 S. Ct. 249; United States v. Yellow Cab Co., 338 U. S. 338, 341, 94 L. Ed. 150, 153, 70 S. Ct. 177; Bogardus v. Commissioner, supra (302 U. S. at 45) (dissenting opinion).

"This conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area, any more than a system based on the determinations of various fact-finders ordinarily does."

The burden is on appellants to show that the findings of fact of the trial court upon which its judgment is based are clearly erroneous. **Murphy v. Shelby**, 353 F. 2d 418, 421 (C. A. Mo. 1965); **Montgomery Ward & Co. v. Steele**, 352 F. 2d 822, 826 (C. A. Mo. 1965); **Manning v. Jones**, 349 F. 2d 992, 995 (C. A. Mo. 1965).

In order for the reviewing court to set aside the findings of fact by the trial court sitting without a jury, it must be clearly demonstrated that such findings were without adequate evidentiary support in the record, or were induced by an erroneous view of the law, and the burden of showing that the findings are clearly erroneous is on the one attacking them. **Cedillo v. Standard Oil Co. of Texas**, 291 F. 2d 246, 248 (C. A. Tex. 1961), certiorari denied 368 U. S. 955, 82 S. Ct. 397, 7 L. Ed. 387 (1962).

3.

The "De Minimis" Doctrine Has No Relevance to Redistricting Matters.

Appellants attempt to start with the *de minimis* doctrine and to arrive at a formula for shifting of the burden of proof on a question of population variances.

Let us examine the doctrine. **Black's Legal Dictionary**, Fourth Edition, says:

"DE MINIMIS NON CURAT LEX. The law does not care for, or take notice of, very small or trifling mat-

ters. The law does not concern itself about trifles. Cro. Eliz. 353. Thus, error in calculation of a fractional part of a penny will not be regarded. Hob. 88. So, the law will not, in general, notice the fraction of a day. Broom Max. 142."

It is a long jump from calculating a fractional part of a penny, to determining the extent to which the right of a voter to an equal vote may be devaluated. The cases in point are quite limited. In **Schwartz v. Essex County Board of Taxation**, 129 N. J. L. 129, 28 A. 2d 482, 484, the Supreme Court of New Jersey examining a taxpayer's suit, said:

> "Respondents next assert that inasmuch as the prosecutor's assessment for the year 1940 was on a total valuation of $600, resulting in a tax to him of $29.10, that, applying the maxim de minimis non curat lex, the court should not burden itself with this problem. It is true that the pecuniary interest of the prosecutor is small. However, the constitutionality of a legislative act is called in question by the assertion that the legislature has exceeded its jurisdiction. **An attack upon the constitutionality of a legislative act is never unimportant**, and the standing of one otherwise qualified to question the legislation is not to be determined by the mere matter of dollars and cents involved. Cf. Cooley on Constitutional Limitations, 4th Ed., c. 14, pp. 646, 647" (Emphasis supplied).

Since **Baker v. Carr** the right of the individual voter to pursue legal action against inequitable redistricting has been clear. The right of voter franchise is never a trivial matter.

As pointed out by the lower court the use of the concept of "de minimis" in apportionment decisions can only be used to support minor variations from exact equality

where the variances result despite the application of proper constitutional principles. It may not be used to excuse the violation of those principles. There is no "de minimis" doctrine which supports a plan which is "a little bit unconstitutional".

Appellees believe the lower court has commented on every reported use of the phrase "de minimis" in apportionment cases (A. J. S. 9-11).

Variances which result from constitutionally unacceptable standards are not "de minimis". Paraphrasing this court's statement in **Lucas v. Colorado General Assembly**, 377 U. S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632, 646, Appellees believe the rule should be that disparities from population based representation, though minor, may render the apportionment scheme constitutionally suspect if only justified on a non-rational basis. Variations to be constitutionally acceptable must be slight and based on constitutionally justifiable grounds.

4.

The Districts of the Act Are NOT as "Nearly Equal as Is Practicable", Because Transfer of Whole Counties Between Adjacent Districts Would Create Districts More Nearly Equal.

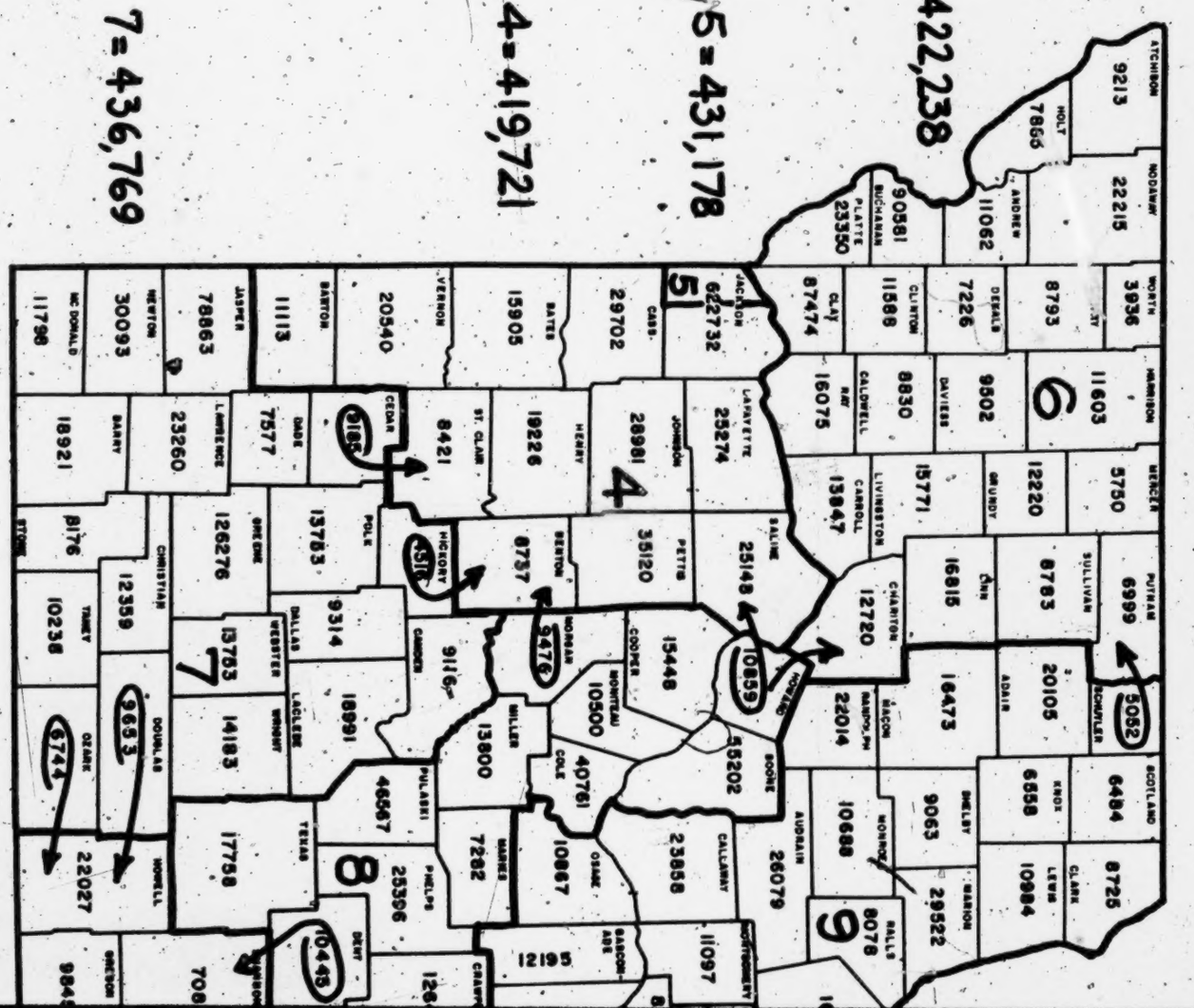
The districts created by the 1967 Act are NOT as nearly equal as is practicable, because simple transfers of even whole counties from the higher to the lower of adjacent districts could have been made which would have resulted in district populations significantly closer to equality.

An inspection of the table and map which follows will reveal how many of such transfers could easily be made; the table offers a choice of counties for transfer; other possible transfers are apparent.

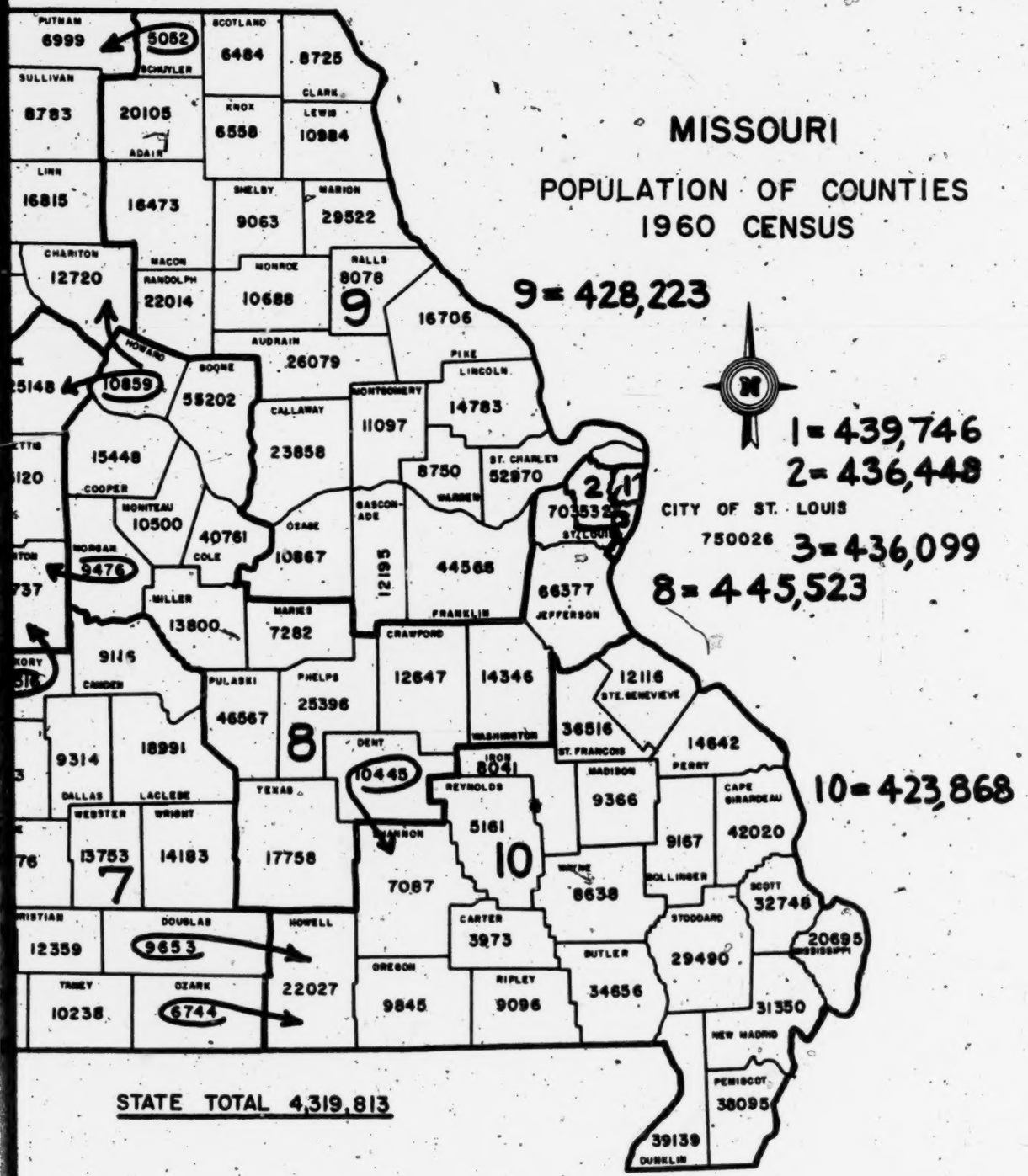
POPULATION DIFFERENCES BETWEEN DISTRICTS

Populations Under 1967 Act				Suggested	Populations After Suggested Transfer				
Higher District	Lower District	Difference	County Transfer					New Difference
(8th) 445,523	(10th) 423,868	+ 21,655	Dent	10,445	(8th)	435,078	(10th) 434,313	+ 765
(8th) 445,523	(4th) 419,721	+ 25,802	Howard	10,859	(8th)	434,664	(4th) 430,580	+ 4,084
(8th) 445,523	(4th) 419,721	+ 25,802	Morgan	9,476	(8th)	436,047	(4th) 429,197	+ 6,850
(8th) 445,523	(6th) 422,238	+ 23,285	Howard	10,859	(8th)	434,664	(6th) 433,097	+ 567
(7th) 436,769	(4th) 419,721	+ 17,048	Cedar	9,185	(7th)	427,584	(4th) 428,906	— 1,322
(7th) 436,769	(4th) 419,721	+ 17,048	Hickory	4,516	(7th)	432,253	(4th) 424,237	+ 8,016
(7th) 436,769	(10th) 423,868	+ 12,901	Douglas	9,653	(7th)	427,116	(10th) 433,521	— 6,405
(7th) 436,769	(10th) 423,868	+ 12,901	Ozark	6,744	(7th)	430,025	(10th) 430,612	— 587
(9th) 428,223	(6th) 422,238	+ 5,985	Schuyler ...	5,052	(9th)*	423,171	(6th) 427,290	— 4,119

* Adjust further by transferring excess present in the (1st) or (2nd) to the (9th).



STATE TOTAL 4,319,813



The Congressional Representative Districts of Missouri Created by the 1967 Redistricting Act.

The official district population data prepared by the Bureau of the Census (Item 13 of "Stipulation of Evidence") is as follows:

District	Population	District	Population
1	439,746	6	422,238
2	436,448	7	436,769
3	436,099	8	445,523
4	419,721	9	428,223
5	431,178	10	423,868

State total population: 4,319,813

District average population: 431,981

The City of St. Louis (a city not within a county) contains a part of District 1 and a part of District 3.

The County of St. Louis contains all of District 2 and a part of each of Districts 1, 3, 8, and 9.

Jackson County contains all of District 5 and a part of District 4.

Kansas City contains all of District 5 and a part of District 4. One ward of Kansas City which is in Clay County is in District 6.

Closer approach to equality of district populations can also be attained by utilizing smaller political subdivisions, such as townships of the counties, and also wards and precincts, particularly in the more populous areas.

The heavily populated First, Second, and Third districts, situated in the populous areas of St. Louis County and the City of St. Louis, could have been easily adjusted among themselves. The Ninth district which is in need of adjustment by addition of population, particularly after the suggested transfer of Schuyler County to the Sixth, could have attained this additional population from the First or Second, each of which has an excess of population.

The changes suggested indicate that the General Assembly did not create districts as nearly equal in population as it might have easily created by a few obvious shifts of existing political units between adjacent districts. Sufficiently close and easily attainable population equality of the districts has not been accomplished by the 1967 Act.

5.

"Legislative Interplay" Is NOT a Constitutionally Acceptable Basis for Variances From Equal Population Districts.

Appellants argue that allowance can be made for "legislative interplay", "political compromise" and "practical political problems" (App. Br. 38-44). Appellees urge the court to reject this argument, as did the trial court, which said (A. J. S. 7):

> "In other words defendants would have this court hold that their definition of 'practicable' is legally equivalent to 'acceptable to a majority of the legislature'. We reject that argument."

No good purpose, in judicial efforts to define constitutional standards for district line-drawing, would be served by adding to the redistricting lexicon phrases so subject to broad interpretations. The courts are already plagued with confusion over the use of the terms "political question" and "political thicket".

Certainly if Appellants are suggesting that partisan political considerations, or the interests of individual legislators in favorably structured districts, are acceptable reasons for unequal districts, this court should clearly state that such standards for variance are **not** constitutionally permissible.

Numerous federal decisions, including those of this Court, refer to the responsibility for congressional redistricting, as a function of the state legislatures. One sometimes sees the language employed that the job of redistricting is a political matter. Perhaps a closer examination of the terms is in order.

The power and authority to establish congressional districts within a state is derived from Article I of the Constitution. Section 2 provides "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States". Section 4 says "The Times, Places and Manner of holding elections for Senators and Representatives shall be prescribed in each state by The Legislature Thereof." In **Wesberry v. Sanders**, 376 U. S. 1, 6, 11 L. Ed. 2d 481, 486 (1964), this court made it clear however that

> "* * * nothing in the language of that Article gives support to a construction that would immunize state congressional apportionment law which debase a citizen's right to vote from the powers of courts to protect the constitutional rights of individuals from legislative destruction * * *"

The terms "political question" and "political thicket" have ceased to be a barrier to proper judicial action since **Baker v. Carr** yet the idea still seems to pervade some legislative halls that there is a range within which political considerations may be acceptable in causing variations from districts of equal population.

Probably some hundred or more federal decisions, a score or more of them by this Court, have made it clear that equal weighting of all persons' votes is the standard; however, the significance of **Baker** and its progeny seems not yet to have been fully accepted by the legislatures of the several states. So we see it necessary for the federal courts to repeatedly point out that legislatures are bound by certain constitutional limitations in the exercise of these duties. Why is it that in state after state the legislature cannot achieve a constitutionally acceptable plan until it has made the trip to the federal court at least once and frequently twice?

In truth the balancing of districts by population is not and never was a "political question". **Black's Law Dictionary**, Fourth Edition, defines "political questions" as:

> "Questions of which the courts of justice will refuse to take cognizance, or to decide, on account of their purely political character; or because their determination would involve an encroachment upon the executive or legislative powers; e. g., what sort of government exists, whether a foreign country has become an independent state, etc. Kenneth v. Chambers, 14 How. 38, 14 L. Ed. 316."

Certainly the language of Article I and of this Court makes it clear that in performing the function of congressional district line-drawing the legislature is acting as a surrogate for the people, in whom the constitutional power to elect congressmen ultimately rests.

What we are concerned with is the right of the individual voter. The confusion arises, it seems to Appellees, from thinking of the legislature's task as a prerogative or power rather than a legislative task, duty, and responsibility to the people.

The lower court found on the facts that the legislature failed in its duty to the people by permitting considerations of "political compromise" and "legislative interplay" to enter into its structuring of the district lines. The lower court specifically said (A. J. S. 7):

> "We find that defendants' evidence leads to the inevitable conclusion that a majority of the members of the Legislature were motivated by other considerations than the constitutional objective of 'practicable equality'."

As Judge Collinson stated (A. J. S. 98):

> "* * * on its face and under the undisputed evidence it is not an attempt to divide the State of Missouri in Congressional districts that are as nearly equal in population as is practicable."

The goal is mathematical equality. Perfection may not be obtainable by mortal man. But it should be sought. The obligation of the legislature is to make a good faith effort to meet the constitutional standard, unhampered by personal or partisan political considerations. The objective is not to meet a minimum standard but to come as close as possible to a solution which treats each voter on an equal basis. The federal courts will only cease to be flooded with reapportionment litigation when state legislatures cease to conceive of the task of redistricting as one which permits them to engage in political gamesmanship.

It is perhaps appropriate to point out that there are real differences between a state's role in structuring legislative districts for state representatives and state senators

as opposed to a state legislature's role in drawing congressional district lines.

In the first instance there is an area for political judgment. Should the body be elected at large or from districts? Should there be one or two houses of the legislature? How many members should there be in each house? Must legislators reside in a particular district? Should some legislators be elected at large and others from districts? Should at large legislators reside in specific districts? These are political questions which the people of a state may determine and later change, subject to federal constitutional limitations requiring equal protection of the laws.

On the other hand the state's role in congressional redistricting is much more restricted. The number of congressmen is set by federal law. Under present federal statute they may not be elected at large. The only specific power given the state legislatures is the right to determine "The time, place and manner of holding congressional elections" (Art. I, § 4).

The legislature in addition has the duty of redrawing the congressional district lines after each federal census. That duty is a largely mechanical one, arising solely from the necessity for change arising from changes in a state's relative population. Such changes do not present political questions and the duty is confined within a narrow scope by constitutional limitations. It is not intended to create opportunities for oppression of racial or political minorities by the majority, nor the opportunity for creating favorable districts to a party, class or interest.

The history of legislative line-drawing prior to **Baker** teaches that the will of the people is progressively subverted and deviations from equal representation become progressively worse, unless the legislatures are told in

clear language what their line-drawing duty is, and, what they may not do. When there is a "political thicket", it arises not because there is a "political question", but because the constitutional limitations and the democratic ideal of equality are ignored.

Appellants by their argument that political or legislative interplay is a constitutionally acceptable and rational basis for variance from a population formula *impliedly* and *perhaps expressly concede* that such interplay occurred in the Missouri legislature in the adoption of the 1967 Act. Some quotations from the transcript will make clear that the trial court's finding was based on substantial evidence and further explain appellants' arguing and attempting to establish "political expediency" as a constitutionally acceptable ground.

Appellees start with the premise which is not disputed by Appellants, namely, that numerous shifts of whole counties from one congressional district to another would have resulted in the 1967 Act achieving a much closer approximation of equality of population between districts.

What then was the evidence presented which intended to rationally excuse the adoption of a less adequate plan? The answer came quite clearly from the legislators who testified.

Mr. Richard J. Rabbitt, the majority floor leader, testified (A. R. 72):

> "We are dealing with men, and those men represent people at home, and I think they have to follow those people's wishes, so we had to try to adopt a plan that could get 82 votes in the House and 18 votes in the Senate."

and (A. R. 72-73):

> "• • • we tried to, if possible, stick to historical usage of these counties in districts • • •"

and (A. R. 76):

> "I think that it is a reasonable legislative compromise."

and (A. R. 77):

> "I will say this, that there probably were changes that could be made that would do what you are saying [i. e., reduce the variances], but I don't think a bill like that could have passed".

Senator William Baxter Waters, majority leader of the State Senate, similarly testified (A. R. 83):

> "Q. Now, Senator, you have testified that population was your prime consideration in considering this legislation, but you have also testified that you gave recognition to the necessity of enacting an act? A. Passing a bill, yes, sir."

He also admitted that the legislature took historical factors into account (A. R. 83-84).

State Senator Thomas G. Woolsey stated (A. R. 91-92) that his concern was with seeking to establish districts, where possible, which would be politically balanced and thought the bill as passed was unfavorable to his (the Republican) party. He recognized the bill as a political compromise (A. R. 93). Similar testimony was given by the House minority floor leader, R. J. King, Jr. (A. R. 95-97). He conceded that the legislature was working with erroneous population figures and they didn't have a good opportunity to look at the bill.

> "Q. * * * do you have an opinion as to whether or not the 1967 Congressional Redistricting Act is a reasonable and fair compromise? A. I believe, in retrospect, that it is a fair compromise. I would say that most of our opposition to the House Substitute [the Act] came from, one, the fact that we did not

have a real good opportunity to see this bill, this substitute, we really didn't know what it did, and I think this is evidenced by the fact that the errors in the population showed up. * * *"

State Senator Omer H. Avery, chairman of the Reapportionment Committee, testified (A. R. 116):

"* * * It was also the desire of the committee that the districts, the ten districts, be changed only as much as would be necessary to make them come within the population limitations and not try to make any political complexion changed [sic] designedly as to any particular district."

Senator Avery's testimony made it clear that his committee took a 2% variation as an acceptable variance within which to make political accommodations (A. R. 116-120).

The trial court has fully discussed the other unacceptable considerations: (1) the use by the legislature of inaccurate figures not based on the 1960 census; (2) that the legislature's district figures were in error and the use of the correct figures produced greater variations than those contemplated by that body in adopting the 1967 Act; (A. R. 99), and (3) the ease with which shifts of whole counties and convenient political subdivisions could have produced more equal districts.

The foregoing illustrates some of the so-called legislative interplay. The attempt was to barely come under the wire of possible constitutional acceptance and not a good faith effort to achieve the best possible plan from a population standpoint. Certainly there was substantial evidence to support the trial court's findings.

6.

Compactness Is NOT a Defense to Unbalanced Districts.

Appellants argue that by shifting counties to achieve closer balancing of district populations, the districts might become less compact. Appellees find it strange to justify malapportionment by claiming to seek compactness. The "compact and contiguous" concept of the ideal district is a doctrine seeking to avoid gerrymandering. Gerrymandering itself is but a device by which improper political objectives (districts unjustifiably favorable to a candidate, party or interest) are sought, without violating the doctrine of equality of population.

If geographic compactness was a concern of the General Assembly, this objective certainly was not attained in the Act; the sprawling irregular shape of the Eighth District, in two instances only one county wide, wandering irregularly across nearly two-thirds of the width of the entire state does not comply with any definition of "compact".

The changes suggested by Appellees, of transferring several counties from a district of higher population to an adjacent district with lower population (discussed pages 13-16 this brief), do not make the Eighth District any less compact nor affect significantly the compactness of any other districts.

7.

Percentage or Numeric Comparisons With Other Decisions Are of No Significance in Testing Good Faith Efforts or Compliance With Acceptable Standards.

Appellants, and particularly Appellants Heinkel, et al., seek to justify the 1967 Act by comparison with the mathematics of other decisions and particularly, **Gong v. Kirk**, 278 F. Supp. 133; affirmed, sub nom. **Kirk v. Gong**,

389 U. S. 574, 88 S. Ct. 695, 19 L. ed. 2d 784, and **Connor v. Johnson**, 279 F. Supp. 619, affirmed per curiam, 386 U. S. 483.

In **Swann v. Adams, III**, 385 U. S. 440, 445, 87 S. Ct. 659, 17 L. Ed. 2d 501 (1967) this Court stated that the approval of a variance in one state has little bearing on a similar variance in another state. Logically each case must be considered on the basis of its particular facts. See also **Reynolds v. Sims**, 377 U. S. 533, 578:

> "What is marginally permissible in one state may be unsatisfactory in another depending on the particular circumstances of the case."

Looking beyond the rule of **Swann v. Adams, III**, there are further reasons for discarding **Gong v. Kirk**, supra, and **Connor v. Johnson**, supra, as comparable precedents. First of all in each case the lower court itself either made the districts **(Gong)** or upheld a redistricting act **(Connor)** and each was affirmed by this Court on appeal. Consequently the heavy burden of overcoming the weight of the trial court's findings was not placed upon this Court, whereas in the instant case this Court must find that there is no substantial evidence to support the trial court's fact findings to justify a reversal. Secondly, the records and decisions in both **Gong** and **Connor** do not disclose that there was evidence in either case to indicate that the respective court or the legislature based their actions on constitutionally unacceptable grounds.

The trial court has fully covered the untenable reliance of Appellants on **Connor v. Johnson** (A. J. S. 65-68). The issue presented to this Court in said case was solely the question of racial discrimination under the Fourteenth and Fifteenth Amendments. No issue was framed or presented based on Article I.

In **Gong v. Kirk**, 278 F. Supp. 133, 135 (1967), the three-judge court itself redistricted the state of Florida,

resulting in districts varying 8,027 from the largest to the smallest. Populations of voting precincts were calculated by the court from registration figures as stated by the court:

> "Since federal census figures are not available by presently established precincts, a calculation of the population of each relevant voting precinct was made by determining the ratio, based on the most recent voter registration figures, of the registered voters in each voting precinct to the total of the registered voters of the particular county and applying that ratio to the county population as shown by the 1960 decennial census, i. e. county registration is to county population as precinct registration is to precinct population. **This formula was suggested by both plaintiffs and defendants**[6]" (Emphasis supplied).

Defendants, upon receiving an official Census Bureau calculation of the populations of the districts which differed by 48,824, moved for reconsideration of the judgment and final order, which was denied. Since **all parties** to the suit **had agreed** upon the **use of registration figures as a basis** of calculation of the populations, the official census figures came too late for consideration. This Court subsequently affirmed, in sub nom. **Kirk v. Gong**, 389 U. S. 574 (1968).

Appellants throughout their discussions attempt to create an impression that the differences are much less by calculating or quoting differences in percentages or ratios. The apparent differences are thus reduced by a hundredfold when percentage is stated and are apparently reduced further by quoting the percentage as plus or minus from the average. Quoting the district difference as a ratio or fraction of the average creates a similar false impression. **Population is the true measure of district size**, not percentages or ratios; **people vote**, not percentages.

Appellants' extensive table (App. Br. 29-34) purports to show the population of the highest and lowest district of a state and the maximum difference. Only states are shown where litigation resulted from the dissatisfaction of some citizen voters with the districting acts. Appellees do not vouch for the accuracy of this table but cite it for the sake of argument only.

Appellants state their purpose in submitting the table is as follows (App. Br. 34):

> "* * * It has been appellants' purpose to demonstrate the constitutional validity of the Missouri Act by citation of cases before this court as well as cases before lower courts. Appellants recognize that what is constitutionally permissible in congressional districts in one state is not conclusive upon the constitutional validity of a congressional plan in another state. However, where a pattern has been established by learned members of lower courts throughout the country and where a pattern is developing among the cases which have been summarily affirmed by this court, comparisons become persuasive."

This Court, in **Reynolds v. Sims**, 377 U. S. 533, 577 (1964), established the following principle, which the Court has repeatedly reaffirmed, the latest time being in **Swann v. Adams, III**, 385 U. S. 440, 445, 87 S. Ct. 569, 572, 17 L. ed. 2d 501 (1968).

> "What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case."

This Court in these cases was discussing districting or apportioning of state legislative districts but the same principle applies to congressional representative districting, with the added requirement of a closer approach to population equality for congressional representative districts, concerning which this Court said, **Reynolds v. Sims**, at page 577:

"Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting."

A careful survey and analysis of the data of the above cited table (App. Br. 29-34) does not show that the predominating number of cases decided in the several states significantly favor districting which had greater maximum differences than the Missouri Act. The total number of states listed is 26. Of these there are eleven (11) states having higher population differences than Missouri (Ala., Ariz., Calif., Ga., Ill., Ky., N. H., N. Y., Tex., Va., and Wash.) and nine (9) states have lower differences (Ark., Ind., Md., Mass., Mich., Mont., N. C., Ohio, and Tenn.) and two (2) states (Fla., and Kans.) have lower differences but these used other than federal population data for their calculations and have higher differences only when federal data is estimated and compared. Mississippi has nearly the same difference (26,265 Miss. and 25,802 Mo.) but the emphasis placed by the plaintiffs therein was upon alleged racial discrimination in the making of the districts and the appeal to this Court was **solely** on that question.

Thus an examination of the cases listed is not as persuasive as Appellants would like to have this Court believe. Furthermore, why the litigants in the respective cases did not pursue their litigation to higher courts cannot be ascertained; many were undoubtedly personally satisfied with the districts which had been made by the legislature upon order of the court or made by the court itself, although further litigation, had it been pursued, might have resulted in the districting act's invalidation.

The latest judicial determination of a districting act is only persuasive if that determination is made by this Court, because the litigation is begun and pursued and discontinued for so many reasons irrelevant to the issues

involved therein. Even if determined by this Court, the decision may probably be only persuasive and not conclusive, because the conditions encountered in each state are so different.

CONCLUSION.

The court below in its opinion, decision, and judgment properly found that the 1967 Missouri Congressional Redistricting Act does not comply with Article I, Section 2 of the Constitution of the United States and is unconstitutional and void.

Population differences between the districts created by the Act are gross and excessive (NOT "de minimis" or "minor" as Appellants contend) and violate the judicially established requirement and principle "that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's".

Unwarranted and unjustified population differences between adjacent districts, which differences can readily and easily be significantly diminished by the transfer of whole counties or other political subdivisions from one district to an adjacent district, conclusively prove that the districts have not been created as required by the aforesaid Article I, Section 2.

Respectfully submitted,

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